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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PRACTICE MANAGEMENT INFORMATION CORPORATION,
Petitioner,

vs.

AMERICAN MEDICAL ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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LIST OF PARTIES TO THE PROCEEDINGS PURSUANT TO RULE 29.6

The List of Parties to the Proceedings is contained in the Petition for Writ of Certiorari filed with this Court on February 2, 1998.

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I

THE COURT SHOULD GRANT CERTIORARI TO DECIDE IF PRIVATE AUTHORS MAY ENFORCE COPYRIGHTS IN MATERIALS ADOPTED INTO LAW

A. The AMA Has Abandoned The Ninth Circuit's Holding That Privately Drafted Laws And Regulations May Be Protected By Copyright

The Ninth Circuit's holding that privately drafted laws and regulations may be protected by copyright is so clearly indefensible that even the AMA does not defend it. Indeed, the AMA now accepts the First Circuit's contrary decision in *Building Officials & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) (*BOCA*), as correctly decided. *See* AMA Br. at 9. In so doing, the AMA all but concedes that privately drafted laws should not be protected by copyright.

Instead of defending the Ninth Circuit's decision, the AMA distorts it. Four times in its Opposition, the AMA asserts that the Ninth Circuit merely "rejected petitioner's argument that CPT is a 'law.'" AMA Br. at 8; *see also id.* at 2, 7, 14 n.6. The AMA, however, never cites the Ninth Circuit's decision to support this assertion because there is nothing in the decision for it to cite.

To the contrary, the Ninth Circuit's entire analysis is premised upon its conclusion that the CPT is "material adopted by the government as law." A8-A9. The Ninth Circuit devoted nearly its entire opinion to this issue because of the absence of Supreme Court authority on point. *See* A5-A11. As the Ninth Circuit stated:

> The Supreme Court has not considered a case in which the author asserted a

> proprietary interest in ***material adopted by the government as law***.

A8-A9 (emphasis added).

Moreover, because it recognized that the CPT has been adopted into law, the Ninth Circuit discussed only those cases which address the copyrightability of statutes, regulations, and judicial opinions. *See* A5-A11 (discussing *Banks v. Manchester*, 128 U.S. 244 (1888), *BOCA*, 628 F.2d 730, and *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994)). The Ninth Circuit did not cite any decisions relevant to the AMA's made-up holding that the CPT is not a part of state or federal law.

In addition, the Ninth Circuit concluded that recognizing copyright protection for privately drafted laws was consistent with its own view of sound public policy. According to the Ninth Circuit, "organizations that develop . . . ***model codes*** and standards warn they will be unable to continue to do so if the ***codes*** and standards enter the public domain when ***adopted by a public agency***." A7 (emphasis added). The Ninth Circuit felt this concern was "a matter of particular significance . . . because of the 'increasing trend toward ***state and federal adoptions of model codes***'." A6 (emphasis added, citation omitted). This entire public policy discussion would have been utterly irrelevant if the Ninth Circuit had concluded that the CPT had never been adopted into law. Plainly, the Ninth Circuit understood that the CPT has been adopted into law, but nevertheless upheld the AMA's copyright in the CPT.

B. The AMA's Assertion That The CPT Has Never Been Adopted Into Law Is Refuted By The Many Laws And Regulations That The AMA Fails To Cite

In addition to mischaracterizing the Ninth Circuit's opinion, the AMA also mischaracterizes the role of the CPT in state and federal law. The AMA repeatedly asserts that the CPT has never been adopted into law. *See, e.g.* AMA Br. at 7-8. Yet, the AMA does not discuss or even cite the many state and federal laws and regulations which adopt the CPT as law, all of which were discussed at length in PMIC's Petition. *See* Pet. at 7-10 & Appendix G.

The unambiguous text of the these laws and regulations clearly establishes that the CPT has been adopted into law. For example, as PMIC explained in its Petition, the State of California has expressly and unequivocally adopted the CPT as a regulation. *See* Pet. at 9. California law declares that:

> The Physicians' Current Procedural Terminology, 1987, and subsequent editions, is herein incorporated by reference into these regulations.

CAL CODE REGS. tit. 22, § 51050 (1994); *see also* A4 n.3. California law further declares that any document incorporated by reference into a regulation "shall be deemed to be a regulation." CAL CODE REGS. tit. 1, § 20(e) (1994). The State of California could not have spoken more clearly. The CPT is a part of California law. The AMA's contrary assertion ignores reality.

The CPT has been similarly incorporated into federal law. The CPT, and no other source, contains the listing of code numbers which must be included on Medicare, Medicaid, or Federal Employees' Compensation Act reimbursement forms. *See Omnibus Budget and Reconciliation Act of 1986*, Pub. L. No. 99-509 § 9343(g), 100 Stat. 2040 (1986) (adopting the HCFA Common Procedure Coding System, which includes the CPT); 42 C.F.R. § 433.112(b)(2) (1997) (incorporating *State Medicaid Manual*, Part 11, Section 11300, which adopts the CPT); 20 C.F.R. § 10.411(c) (1997) (directly adopting the CPT); Pet. at 7-9. The AMA simply ignores all of the governing statutes and regulations, and argues instead that whether the CPT has been adopted into law is a "fact-bound question." AMA Br. at 14 n.6. That assertion merits no response.

C. The AMA's Attempt To Resolve The Conflict Among The Circuits Is Meritless

The AMA asserts that the decisions of the First, Second, and Ninth Circuits are not in conflict. According to the AMA, these decisions, when read together, hold that privately drafted laws are not protectable by copyright, but works which the law requires the public to use to comply with the law are protectable by copyright. AMA Br. at 8-9. This argument is meritless for several reasons.

As an initial matter, the First, Second, and Ninth Circuits have never drawn any such distinction. Thus, the decisions, as written, stand in conflict. The First Circuit has held that privately drafted laws cannot be protected by copyright, *BOCA*, 628 F.2d at 733-35, while the Second

and Ninth Circuits have held to the contrary. *CCC*, 44 F.3d at 73-74; A5-A11.

In addition, the circuit court decisions are irreconcilable even on the terms proposed by the AMA. The Second Circuit's decision in *CCC* was not a case of "mere government mandated use," as the AMA contends. AMA Br. at 9. Rather, the used car price guide in *CCC* affirmatively set the legally mandated reimbursement rates for insurance companies in the States of New York and New Jersey. *CCC*, 44 F.3d at 73 & n.29. Even the AMA recognizes that something which "prescribe[s]" the extent to which the public "may receive reimbursement" is a law. AMA Br. at 8. Nevertheless, the Second Circuit upheld the copyright in the price guide.

Similarly, the present case does not involve "mere government mandated use." As discussed above and in PMIC's Petition, the CPT is an inextricable part of state and federal law, and has even been expressly incorporated into law.

The AMA also attempts to dismiss the First Circuit's decision in *BOCA* because "*BOCA* was not a decision on the merits, but rather a ruling on preliminary injunctive relief." AMA Br. at 9. That, however, in no way undermines the First Circuit's holding, or the existence of a circuit conflict. The district courts in the First Circuit will follow *BOCA*, while the district courts in the Second and Ninth Circuits will follow the decisions in *CCC* and in the present case.

D. Even If The AMA's Arguments Were Accepted, This Case Would Still Present An Issue Of Great National Importance, Meriting This Court's Review

Even if the conflicting circuit court decisions could be harmonized in the manner now urged by the AMA, this case would still present an issue of great national importance. As the First and Ninth Circuits have recognized, a growing number of laws and regulations governing the American public are drafted by private organizations. A6; *BOCA*, 628 F.2d at 736. Indeed, as the AMA concedes, it is now federal policy to adopt privately drafted codes and standards as law whenever practical. *See* AMA Br. at 11 (quoting 58 Fed. Reg. 57,643, 57,644-45 (1993)).

Clearly, there is a great national interest in knowing whether private parties may serve as the exclusive source for these many laws and regulations, preventing even the government from publishing its own regulations. There is an obvious national interest in knowing whether the laws will be available at the lowest price a competitive market will allow, or the highest price a monopolistic market will bear.*

---

* The AMA asserts that it has never "restrict[ed] publication and distribution of CPT." AMA Br. at 4 (editorial brackets in AMA Brief). This is absurd. The AMA has obtained an injunction preventing PMIC from publishing the CPT, *see* Appendix F, and the AMA will not permit any of its competitors, or even the government itself, to publish the CPT.

Similarly, there is a great national interest in knowing whether the AMA is correct that a tenable distinction exists between "mere government mandated use" and adoption of a private code or standard as law. The AMA is likely correct that the WordPerfect computer program is not in the public domain merely because the government requires documents to be prepared in Word-Perfect format. AMA Br. at 11 n.5. However, other works – such as the CPT, the price guide at issue in *CCC*, and the citation rules of the *Bluebook* – are ingrained far more deeply into the law. Again, there is a great national interest in knowing the extent to which the government may incorporate private works into law, while still permitting the author to maintain a copyright monopoly.

E. The AMA's Takings Clause Argument Provides A Reason For Granting Certiorari, Not Denying It

The AMA asserts that invalidation of its purported copyright "would raise a substantial issue under the Takings Clause." AMA Br. at 12. Even if this were true, it would hardly provide a basis for denying PMIC's Petition. A possible conflict between the public's constitutional right to publish and distribute the laws and the AMA's constitutional right to just compensation is a reason for granting certiorari, not denying it.

Moreover, the record in this case is abundantly clear that the AMA consented to the adoption of the CPT into law. The AMA granted a copyright license to the federal government for the specific purpose of achieving the adoption of the CPT into federal law. *See* J3-J4 at ¶¶ 1-3a (attached hereto). Thus, no taking could have

occurred. In any event, even if a taking did occur, the AMA would have an adequate remedy before the Court of Federal Claims. *See* 28 U.S.C. §§ 1491, 1498.

II

THE CIRCUITS ARE ALSO SHARPLY DIVIDED OVER THE SECOND QUESTION PRESENTED: THE COPYRIGHTABILITY OF FUNCTIONAL SYSTEMS

As PMIC explained in its Petition, several circuit courts have held that functional systems cannot be protected by copyright, while a minority of circuit courts have held that systems may be protected as long as other systems are available. *See* Pet. at 25-30. In response to this conflict, the AMA simply assumes that the minority view is correct. According to the AMA, its medical coding system is entitled to copyright protection because "[s]everal other works of medical nomenclature exist, and an infinite number are possible." AMA Br. at 12 (citation omitted). Obviously, the AMA cannot resolve the circuit conflict merely by assuming that the minority view is the correct one.

The AMA also asserts that the circuit court decisions are not in conflict because each was decided on its own unique facts. AMA Br. at 15. This argument is meritless. This Court rarely, if ever, reviews two decisions which conflict on identical facts. Rather, this Court reviews cases when the decisions of the circuit courts are in conflict on an important issue of law.

The AMA also argues that PMIC has "wrenched from the cases overbroad legal principles" to generate a false conflict. AMA Br. at 15. This assertion simply does not withstand analysis. In the present case, the Ninth

Circuit did indeed hold that the AMA's "existing system" may be protected by copyright because others may "develop[] comparative or better coding systems." A11 n.8. Similarly, the Eighth Circuit held in *Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986), that the plaintiff could copyright a "parts numbering system" but "could not copyright the idea of using numbers to designate replacement parts." Thus, in the Eighth Circuit's view, a system may be protected by copyright as long as the copyright owner does not monopolize an entire class of systems.

In contrast, the Eleventh Circuit held in *Warren Publ'g, Inc. v. Microdos Data Corp.*, 115 F.3d 1509, 1517 (11th Cir. 1997) (*en banc*), that a "system of selecting communities" to include in a cable television guide was not protectable by copyright. The Eleventh Circuit reached this conclusion even though the plaintiff's system was "unique" and other systems obviously existed. *Id.* Similarly, the First Circuit denied copyright protection to a specific "method of conducting a radio promotional contest," even though many other methods were available. *CCM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1518-19 (1st Cir. 1996). Likewise, the Second Circuit denied copyright protection to a specific "system of shorthand," permitting protection only in "the explanation of how to do it." *Brief English Sys., Inc. v. Owen*, 48 F.2d 555, 556 (2d Cir. 1931). The circuits, therefore, are plainly in conflict.

Lastly, the AMA asserts that the CPT is not a system at all, but "merely one expression of the idea of a work of medical nomenclature." AMA Br. at 12. But, the AMA is in no position to assert that the CPT is not a

system. In the CPT itself, the AMA refers to the CPT as a "system of terminology" and a "coding and recording system." *See Physicians' Current Procedural Terminology* iii, x (1994). Similarly, in its agreement with the federal government, the AMA referred to the CPT as a "system of nomenclature and codes." J2 (attached hereto). In addition, the Ninth Circuit expressly recognized that the CPT is a "system." A11 n.8. The CPT is clearly a system; the only issue is whether this Court should endorse a judicially created exception to Congress' clear prohibition against copyright protection for systems, as set forth in 17 U.S.C. § 102(b).

CONCLUSION

Because of the great national importance of the questions presented, and because of the circuit conflicts underlying the questions presented, this Court should grant PMIC's Petition for a Writ of Certiorari.

Respectfully submitted,

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Counsel of Record
Paul A. Stewart
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Attorneys for Petitioner
PRACTICE MANAGEMENT INFORMATION CORPORATION

Date: March 11, 1998

APPENDIX J

AGREEMENT

The Department of Health and Human Services
Health Care Financing Administration
and
American Medical Association

[SEAL]

AGREEMENT

The Department of Health and Human Services
Health Care Financing Administration
and
American Medical Association

This Agreement is entered into February 1, 1983, between the Department of Health and Human Services, Health Care Financing Administration (hereinafter for convenience referred to as "HCFA") and the American Medical Association (hereinafter for convenience referred to as "AMA").

WHEREAS, the AMA has developed, published and updated a system of nomenclature and codes for describing medical procedures performed by physicians, which is commonly known as physicians' Current Procedural Terminology, now in its fourth edition (CPT-4); and

WHEREAS, HCFA has responsibility for administering various health care reimbursement, oversight and other programs in which procedures performed by physicians are routinely reported to HCFA, its agents and other entities participating in programs administered by HCFA; and

WHEREAS, HCFA has developed a new system of nomenclature called HCFA Common Procedure Coding System (HCPCS) for these purposes; and

WHEREAS, HCFA has concluded that CPT-4 is suitable for uses in HCPCS; and

WHEREAS, AMA is willing to permit HCFA, its agents and other entities participating in programs administered by HCFA, and the health care field in general to use CPT-4 codes and terminology as part of HCPCS;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, the parties agree as follows:

1. HCFA shall adopt and use CPT-4 in connection with HCPCS, for the purpose of reporting physicians' services under Medicare and Medicaid. HCFA agrees not to use any other system of procedure nomenclature in HCPCS for reporting physicians' services. HCFA retains sole responsibility for determining which codes represent covered services and the amounts to be paid for those services.

2. HCFA shall: (a) publicly endorse the use of CPT-4 based HCPCS for the purpose set forth in paragraph 1; (b) where permitted by HCFA's statutory authority and budgetary constraints, require the use of CPT-4 based HCPCS in programs administered by HCFA by its agents and other entities participating in those programs; and (c) encourage the voluntary use of CPT-4 based HCPCS by others.

3. a. HCFA shall have a non-exclusive, royalty-free, and irrevocable license to use, copy, publish and distribute the most current publicly available CPT-4 to the extent that such is used as part of HCPCS in its programs as specified in this Agreement. HCFA's agents and other entities will be authorized to use copies of

HCPCS provided by HCFA incorporating CPT-4 codes and nomenclature in formats approved in writing by the AMA only for the purposes directly related to participating in HCFA programs (provided, however, that such agents and other entities at all times will clearly separate CPT-4 from non-CPT-4 material and said copies contain the AMA's copyright notices in such content and location(s) as specified by the AMA in its sole discretion) except where AMA agrees to allow HCFA agents and other entities participating in programs administered by HCFA to use CPT-4 in converting their private business coding systems simultaneously with their similar conversion for purposes of Medicare and/or Medicaid.

b. AMA may allow said HCFA agents and other entities to use CPT-4 in converting their private business coding systems simultaneously with their similar conversion for purposes of Medicare and/or Medicaid subject to the AMA's policies and appropriate requirements concerning preservation of the AMA's copyright in CPT-4. HCFA agrees to include a statement in HCPCS that participants will be authorized to use the copies of CPT-4 material in HCPCS only for purposes directly related to participating in HCFA programs and permission for any other use must be obtained from the AMA.

c. HCPCS shall be prepared in format(s) approved in writing by the AMA which include appropriate notice(s) to indicate that CPT-4 is copyrighted material of AMA. All CPT-4 material in the HCPCS must be clearly separated from the non-CPT-4 material and the propriety, adequacy, content and placement of AMA's copyright notice(s) in the HCPCS is subject to the

mutual agreement of HCFA and AMA. Further, all copies, displays and printed versions of HCPCS shall contain the following disclaimer on a page not later than the third page of HCPCS or at such other location(s) as specified by the AMA:

> Physician's Current Procedural Terminology. Fourth Edition, Copyright 1977, 1980, 1981 and 1982 by the American Medical Association ("CPT-4") is a listing of descriptive terms and numeric identifying codes and modifiers for reporting medical services and procedures performed by physicians. This Health Care Financing Administration Common Procedure Coding System ("HCPCS") includes CPT-4 descriptive terms and numeric identifying codes and modifiers for reporting medical services and procedures and other materials contained in CPT-4 which are copyrighted by the American Medical Association.

For purposes of paragraphs 3(a) and 3(c) hereof, AMA shall be deemed to approve HCPCS format(s) provided said format(s) are provided to the AMA in accordance with paragraph 13 hereof and the AMA does not notify HCFA of any objections to said format(s) within thirty (30) days of the AMA's receipt of any format(s).

4. Both AMA and HCFA will encourage health insurance organizations to adopt CPT-4 for the reporting of physicians' services in order to achieve the widest possible acceptance of the system and uniformity of

physicians' services reporting consistent therewith. Therefore, AMA will expeditiously review requests for CPT-4 usage where any HCFA agents or other entities participating in programs administered by HCFA request to convert their private claims processing to HCPCS with CPT-4 as its base and will grant a non-exclusive, royalty-free license to use, copy, publish, and distribute CPT-4 to such HCFA agents or other entities in order to encourage the above stated aims, unless a good cause is extant, and will provide such HCFA agents or other entities its CPT-4 books or tapes at those prices customarily charged to other persons.

5. AMA recognizes that HCFA and other users of CPT-4 may not provide reimbursement under their programs for certain medical procedures identified in CPT-4. Accordingly, HCFA and other health insurance organizations may independently establish policies and procedures governing the manner in which the codes are to be used within their operations. These policies and procedures include, but are not limited to, those related to coverage and reimbursement. To carry out these policies and procedures, HCFA and health insurance organizations may issue instructions governing the use of CPT-4 codes in the claims process, and may specify CPT-4 codes that are not to be used. The parties acknowledge that where certain statutory or regulatory requirements of Medicare or Medicaid cannot be accommodated, HCFA may subject to provisions of paragraph 8 of this Agreement, develop and use an appropriate HCPCS code to meet such requirements after providing notice to AMA. All other additions of new nomenclature or codes, deletions of existing nomenclature or codes, or other modifications to CPT-4 shall be made pursuant to paragraph 8.

6. HCFA shall be solely responsible, at its expense, for any material it prints, distributes, or prepares pursuant to this Agreement as well as all other related activities HCFA may perform under this Agreement. In connection with the preparation thereof, AMA will provide to HCFA, at no expense to HCFA, such consultation services and other background materials in the area of medical procedure terminology as HCFA may reasonably request.

7. AMA may continue to print, publish, sell, and otherwise disseminate CPT-4.

8. Maintenance of CPT-4 Editorial Panel

a. AMA and HCFA acknowledge their joint interest in maintaining CPT-4 as a complete compilation of procedure nomenclature and codes which will be capable of fully describing all medical procedures performed by physicians in the United States. The parties also acknowledge their joint interest in improving the efficiency and effectiveness of procedure nomenclature and coding systems. To these ends, and during the term of this Agreement, AMA shall continue to convene the Editorial Panel which is responsible for maintaining CPT-4.

b. The Editorial Panel has the sole responsibility and authority to revise, update or modify CPT-4. All such modifications shall be published and effective not sooner than thirty (30) days nor later than one hundred eighty (180) days after adoption by the Editorial Panel, except that HCFA may delay for a reasonable period of time the implementation of any

modification to CPT-4 if necessary due to budgetary constraints or other reasonable administrative considerations constituting good cause for the delay.

c. The Editorial Panel shall consist of ten (10) members, with seven (7) members nominated by AMA and one by HCFA. The Health Insurance Association of America and the Blue Cross and Blue Shield Associations each shall also be invited to nominate one member. Should either the Health Insurance Association of America or the Blue Cross and Blue Shield Associations decline to nominate a member, HCFA shall be permitted to nominate (a) replacement member(s). Any person nominated to the Editorial Panel shall be a physician knowledgeable in the areas of medical procedure nomenclature and coding and committed to maintaining CPT-4 in accordance with the highest professional standards and shall be subject to the approval of the AMA Board of Trustees, although said physician need not be an AMA member. All panel members must receive notification of proposed meetings to consider revisions, updates or modifications to CPT-4 with such notice postmarked at least thirty (30) calendar days before the date of the meeting. Any action or recommendation of the Editorial Panel shall be effective upon the majority vote of members present in which a quorum of the members is present. Six (6) members of the Editorial Panel shall constitute a quorum. Expenses and compensation of each panel member shall be paid by the organization nominating that panel member. Necessary staffing shall be provided by AMA at AMA's sole expense. Other expenses not otherwise provided for above shall be borne by the parties proportionately with their representation on the Editorial Panel.

9. During the term hereof, this Agreement shall be applicable to the current edition of CPT-4, as well as any subsequent editions, updates, revisions, and other modifications.

10. This Agreement shall be effective from the date of execution through September 30, 1983. Thereafter, it shall be automatically renewed on a year to year basis except that it may be terminated by either party at any time by giving ninety (90) days written notice thereof to the other party. If AMA terminates this Agreement, HCFA shall have a right to continue using CPT-4 incorporated in HCPCS at the time of AMA's termination. If AMA abandons its rights and/or interest in CPT-4, HCFA shall have the right to continue using CPT-4 without restriction and to make such modifications to CPT-4 as HCFA deems to be necessary.

11. This Agreement may be modified at any time by written agreement of the parties thereto.

12. Neither party may assign its rights or obligations under this Agreement without prior written consent of the other. This Agreement shall be binding upon the successors and assigns of the parties.

13. All notices, requests for approval, and other communications in connection with paragraphs 3(a), 3(c), 10 and 11 of this Agreement shall be delivered in person or by certified mail to the persons at the addresses set forth below, or to such other person(s) or address(es) which may be subsequently designated in writing by the respective parties and shall be considered received under

the terms of this Agreement when actually received by the party.

TO AMA:

Deputy Executive Vice President
Public Scientific and Health
Service Policy
American Medical Association
535 North Dearborn Street
Chicago, Illinois 60610

TO HCFA:

Deputy Administrator
Department of Health
and Human Services
Health Care Financing
Administration
6325 Security Boulevard
Baltimore, Maryland
21207

With a copy to the AMA Office of the General Counsel at the same address.

IN WITNESS WHEREOF, the parties hereby execute this Agreement this 1st day of February, 1983.

AMERICAN MEDICAL ASSOCIATION
By: /s/_____
James H. Sammons, M.D.
Executive Vice President

DEPARTMENT OF HEALTH AND HUMAN SERVICES
By: /s/_____
Richard S. Schweiker
Secretary